Supreme Court, U. S.
FILED
OCT 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-547

JOHN THOMAS DALY,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY,

and

THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

and

THE UNITED STATES INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. _____

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THE TRAVELERS INSURANCE COMPANY,

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THE UNITED STATES INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered July 5, 1979.

Opinions Below

The opinion of the District Court for the Southern District of Ohio, Western Division, not reported and is presented in Appendix A hereto. The opinion of the Court

of Appeals for the Sixth Circuit is not yet reported and is presented in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered 5 July, 1979, and jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statutes Involved

1.) Rule 19 (1) of the Rules of the Supreme Court of the United States

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> '(a) * * *
>
> '(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; as has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

2. 11 U.S.C. Section 35 (a) (8) which provides

> 35. Debts not affected by a discharge — (a) A discharge in bankruptcy shall release a bankrupt from

all his provable debts, whether allowable in full or in part, except such as [:]

> (8) are liabilities for wilful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subsection.

Questions Presented

The three issues presented by this appeal are:

1. First and of primary importance is what is the interpretation of the terms "wilful and malicious" under the bankruptcy act. In the same vain are the Federal Courts bound by the State Courts interpretation of these terms.

2. Secondly is the judgment the State Court upon which bankruptcy is sought, conclusive upon the bankruptcy court and federal courts.

3. Thirdly was whether a debt arising from a judgment in the Franklin County, Ohio, Common Pleas Court finding that the bankruptcy John Thomas Daly intentionally set fire to some boxes located in or near a building was a wilful and malicious act as to the entire building when the finding of the State Court including a finding that the bankrupt did not intend the ultimate destruction of the building which resulted.

Statement of the Case

The facts in this case are not in dispute inasmuch as are facts have been stipulated by Counsel. The facts are that on January 20, 1971, John Thomas Daly, age 18, intentionally set fire to certain empty cardboard boxes located within a supermarket. The fire spread resulting in damage to the building. On January 22, 1973 a complaint was filed by the insurers of the building against Daly alleging in the

first court of the Complaint that he intentionally set fire to the building and in the second count that he negligently set fire to the building. The Court made a finding that Daly "intentionally set fire to some cardboard boxes, but did not intend the ultimate destruction of the building." (see attached Appendix C for Court's findings and stipulation of fact). Thereafter the defendant John Thomas Daly, filed a petition in bankruptcy in the United States District Court for the Southern District of Ohio, Western Division. The Bankruptcy Judge found without argument and based upon the stipulations of fact that the actions were wilful and malicious and not subject to a discharge in bankruptcy. This decision was appealed to the United States District Court Judge who affirmed the Bankruptcy's Judge decision. An appeal to the United States Court of Appeals for the Sixth Circuit affirmed the District Court with one judge dissenting. The three insurers claims against the bankrupt amounts to $45,343.78 plus interest. As noted above, neither party in the Bankruptcy Court called any witnesses and the only evidence before the Court was the joint stipulations of fact, findings of the Franklin County, Ohio Court, and briefs of Counsel. Oral arguments of both Counsel was made to the Court of Appeals.

Reasons for Granting the Writ

The decision of the Court of Appeals should be granted primarily because there is such a deversity of opinion as to what the terms "wilful and malicious" mean under the bankruptcy act. The only Supreme Court case defining these two words is *Tinker* v. *Colwell,* 193 U.S. 473, a 1904 case, from Justices Brown, White and Holmes dissented without opinions. Since then, numerous State Courts and Federal Courts are not at all settled upon the meaning of the words, especially the word malice. Further you find

that almost every State Court has a different definition of malice that is applied to the bankruptcy act definition of malice. Since the new Bankruptcy Act uses precisely the same language as the old law, the Court should make clear what definition shall be applied in all cases by all Courts.

In *Tinker* a debt arose from the bankrupt's criminal conversation with the plaintiff's wife. The bankrupt had been charged and found guilty of trespass *vi et armis* by the plaintiff's husband in an Illinois Court. The Supreme Court held that the injury suffered by a husband as the result of criminal conversation by the bankrupt with his wife need not be caused by actual malice since the "act [of criminal conversation] itself necessarily implies that degree of malice which is sufficient to bring the case within the exception [discharge] stated in the statute." 193 U.S. at 485. The Court I believe wrongly said that since Illinois law defining trespass *vi et armis* necessarily implies that the defendant's action was sufficient to create malice, it also is such under the bankruptcy law. To allow the States to define malice will give us 100 different definitions depending on the State involved and depending upon the tort that occurred.

The dissent in this case filed by Justice Merritt sets forth a clear interpretation of *Tinker* as follows:

> "Tinker has been cited by the preposition that a wrongful act, done intentionally or recklessly without just cause is "malicious" for purposes of the Bankruptcy Act. [Citing 1A Collier, Bankruptcy ¶ 17.17 (14ths ed 1978) I believe Tinker stands for the narrower proposition that malice will be inferred only when the tortfeasor "necessarily" knows at the outset that his actions will cause serious injury to another and nevertheless persists. In Tinker the Supreme Court regarded the act of criminal conversation — seduction of the plaintiff's wife — to be an act that "necessarily implies" a degree of malice. Here, however, the only

> act was the bankrupt's setting fire to the boxes. I do not believe that this degree of intent "necessarily implies" that the bankrupt maliciously intended to destroy the store. Indeed, the state court specifically found that the bankrupt did not intend to set fire to the store. Moreover, the ultimate injury to the store-owner's property was considerably less obvious and foreseeable to the tortfeasor here, who merely set fire to some boxes, then was the injury in *Tinker.*"

Further, the federal courts have also given different definitions to the definition of "malice" under the bankruptcy act and to what was meant by Congress. [See generally 1A Collier, Bankruptcy ¶ 17.17 (14th ed 1978) where the term "reckless" has been related with the term "malice."] See *Haskin* v. *Central Illinois Electric* & *Gas Co.,* 317 Ill. App 106, 45 NE (2d) 500; *Doty* v. *Rogers,* 49 SE (2d) 594; *Greenfield* v. *Tuccillo,* (CCA2) 129 F (2d) 854; *Peters* v. *U.S.,* 177 F 885. Reckless conduct on the part of the bankrupt is not malicious nor does wanton or negligent conduct amount to wilful conduct necessarily but the cases say they do. *Breeds V. McKinney,* 171 O.S. 336 (1960), *Haskin* v. *Central Illinois Electric and Gas,* 45 NE (2d) 500. There must be knowledge of the consequences before malice can be found. Some state cases have correctly reached this conclusion. In *Panchula* v. *Kuya,* 50 O App 556 (1938 Lorain County) where the bankrupt fired a gun across a highway resulting in the accidental killing of a person who was unseen and whose presence was not known about, the Court found no malicious or wilful conduct as defined by the Bankruptcy Act. The Court said the bankrupt's action were not malicious as it required knowledge of the consequences which was not known when the shot was fired. Here the same state reaches different conclusions defining malice under the bankruptcy act. The

definition is as intended by Congress, not by the various Courts in the State and Federal Systems.

The policy of the bankruptcy law is to discharge all honest debtors who have fallen into insolvency to give them another chance in life. I believe the exceptions to allowing discharge under the Bankruptcy Act i.e., fraud, wilful and malicious acts etc. are found only in those cases in which there is shown an intentional wrong; are done with conscious knowledge. I believe the dissent in *Peters* v. *United States,* 177 F 885 at page 889 where Justice Gosscupp makes a very learned discussion of how the Supreme Court determined that under the old bankruptcy law, the exception to discharge founded on fraud could only be founded upon the element of bad faith or conscious wrong involved in the debts from which release is asked. The same test is applied to fraud should be applied to wilful and malicious. I have presented this dissent in Appendix D.

Another issue is presented by the failure of the Court to apply the findings of the Franklin County, Ohio Common Pleas Court that were stipulated to. That Court found that the bankrupt did not intend the building to be burned down. This finding was not subjected to further evidence or witnesses before the Bankruptcy Court and the lower Court should have relied upon the Court's finding and found a lack of malice on the part of the bankrupt. By not doing so, full faith and credit was not given the Court below. An intentional act even though illegal, does not and should not imply maliciousness unless there is a showing that the defendant actually intended the result that happened. As in criminal cases, such intent may be inferred from the evidence, but it cannot be inferred where a Court's finding is that such intent was in fact not found. See *In Re McCarty,* (1934 DC) 8F Supp 518).

Conclusion

The bankrupt is subject to a very large debt that he will be forced to pay unless the ruling of the Court of Appeals is reversed. The state of the law should be clarified once and for all in regards to these terms and it is respectfully requested that the Court review this case.

Respectfully submitted,

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ATTORNEY FOR
PETITIONERS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Bankruptcy No. B-375-1439

IN RE:
JOHN THOMAS DALY,

Bankrupt,

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Plaintiffs,

v.

JOHN THOMAS DALY,

Defendant.

ORDER

(Filed March 8, 1977)

This matter is before the Court on appeal from a decision of Bankruptcy Judge Ellis W. Kerr holding that certain debts were incurred by defendant through acts determined to be malicious and willful and therefore not dischargeable in Bankruptcy. 11 U.S.C. § 35 (a) (8). Since neither party requested a hearing, oral arguments will not be required. Federal Bankruptcy Rule 809.

The debts at issue in this case resulted from an act of defendant, setting a fire inside a supermarket causing substantial damage to its structure and contents. Thereafter, the plaintiff insurance companies filed complaints in the state courts against defendant as subrogees of the insured supermarket seeking judgment against the defendant for sums paid in accordance with certain insurance policies.

On stipulated facts the court held that defendant had intentionally set the fire and judgment was so entered. Defendant then petitioned in voluntary bankruptcy for the discharge of debts owed to the insurance companies.

The issue before the Bankruptcy Court was whether the facts as stipulated demonstrated a willful and malicious act, thereby creating a debt not dischargeable in Bankruptcy. The Bankruptcy Court decided that such acts were willful and malicious within the meaning of 11 U.S.C. § 35 (a) (8). Judgment for the plaintiffs was entered.

Defendant now asserts that the Bankrupt Court erred in holding that the act of setting fire was malicious and willful. He contends that the debts are dischargeable in Bankruptcy proceedings. In support of his contention the defendant argues: (1) that the Bankruptcy Court was bound by the determination of the state court that the act was intentional, rather than malicious and willful; (2) that the Bankruptcy Court misinterpreted the words "willful and malicious"; and (3) that the plaintiffs failed to sustain their burden of proof.

The review of the decision of the Bankruptcy Court by this Court is limited to a determination of whether that decision was clearly erroneous. Federal Bankruptcy Rule 810; *Abbot* v. *Regents of the University of California,* 516 F.2d 830 (9th Cir. 1975). Based upon a thorough examination of the record in this case, this Court holds that the

decision of the Bankruptcy Judge was not clearly erroneous and, to the contrary, is supported by ample authority. The Bankruptcy Court is not bound by the judgment of a state court. *Rivera* v. *Moore-McCormack Lines, Inc.,* 238 F. Supp. 233 (D.C.N.Y. 1965). The Supreme Court of the United States has stated that a willful disregard of one's duty, (an act wrongful in itself), which necessarily causes injury and is done intentionally, is willful and malicious within the statute. *Tinker* v. *Caldwell,* 193 U.S. 473, 487 (1904). Special malice need not be shown. *Id.* at 485. See also, *Greenfield* v. *Tuccillo,* 129 F.2d 854 (2d Cir. 1942); *Harrison* v. *Donnelly,* 153 F.2d 588 (8th Cir. 1946).

In this case the defendant stipulated in state court that the act was intentional. It cannot seriously be argued that the act of setting fire is not wrongful and does not necessarily cause injury. Therefore, the Bankruptcy Court's interpretation of "willful and malicious" is not clearly erroneous. *Den Haerynk* v. *Thompson,* 228 F.2d 72 (10th Cir. 1955).

While there is no dispute that the plaintiffs bear the burden of proving the character of the acts, *Murphy* v. *Wheatley,* 360 F.2d 180 (5th Cir. 1966), the Court agrees with the Bankruptcy Court that the plaintiffs have carried that burden.

The Bankruptcy Court's judgment for the plaintiffs is, therefore, AFFIRMED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-3344

IN RE:
JOHN THOMAS DALY,

Bankrupt,

THE TRAVELERS INSURANCE COMPANY,

and

THE ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

and

THE UNITED STATES INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

JOHN THOMAS DALY,

Defendant-Appellant.

ORDER

(Filed July 5, 1979)

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

Appellant, John Thomas Daly, appeals from the decision of the district court which affirmed the decision of the bankruptcy court finding a certain debt not dischargeable. The debt arose from a judgment entered against appellant in a civil action in the Franklin County, Ohio, Common Pleas Court. Appellant was found to have intentionally set a fire in some boxes adjacent to a grocery store, which fire burned out of control and damaged the grocery store. Appellant contends that the district court and bankruptcy court erred in fiinding that this "intentional" tort constituted a "willful and malicious" injury to property, as required for nondischargeability of the debt.

The court has studied the record and has considered the briefs and oral arguments of counsel and is fully advised in the premises. The court is of the opinion that the courts below did not err in equating appellant's "intentional" tort with the "willful and malicious" injuries referred to in the bankruptcy laws. *Tinker* v. *Colwell,* 193 U.S. 473, 485 (1904). *See also In re Nance,* 556 F.2d 602, 611 (1st Cir. 1977); *Matter of Hickman,* 410 F.Supp. 528, 532 (W.D. Mo. 1976). The debt was correctly held not to be dischargeable.

Therefore, it is hereby ordered that the judgment of the district court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

MERRITT, Circuit Judge, dissenting. The record on appeal, based entirely on the parties' brief stipulation of facts in the Bankruptcy and District courts, reveals that the bankrupt, John Thomas Daly, intentionally set fire to some cardboard boxes in his employer's store. We do not know why. The fire spread and damaged the store itself. The storeowner's insurers, plaintiffs in this case, brought a civil damage suit against Daly in state court. The insurers pleaded in the alternative that Daly was liable for intentionally or negligently causing the damage to the store. The state court found, and the parties stipulated below, that Daly intended to set fire to the boxes *but that he did not intend for the fire to spread.* The state court held Daly liable in the amout of $29,149.57. It is not clear from the state court's judgment whether liability was based on a theory of intentional tort or negligence. It is clear, however, that intentional tort and negligence were the only two theories pleaded by the plaintiffs. No punitive or exemplary damages were sought or awarded.

Relying primarily on the 1904 Supreme Court decision in *Tinker* v. *Colwell,* 193 U.S. 473 (Justices Brown, White and Holmes dissenting without opinion), the District Court held that the judgment was not dischargeable in bankruptcy because the bankrupt had acted with "malice." I believe that the District Court read the *Tinker* opinion too broadly and that malice cannot be found from the facts of this case.

In *Tinker,* the debt held to be nondischargeable arose from the bankrupt's liability for criminal conversation with the plaintiff's wife. The Court discussed the origins of the tort of criminal conversation in the common law action for trespass *vi et armis* and defined the injury to the husband as

> the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon which the thorough maintenance of the whole social order rests . . . .

193 U.S. at 484. The Court then held that the injury suffered by a husband as the result of criminal conversation with his wife need not be caused by actual malice to be considered malicious within the meaning of the Bankruptcy Act. In so holding, the Court said that "the act [of criminal conversation] itself *necessarily implies* that degree of malice which is sufficient to bring the case within the exception [to discharge] stated in the statute." 193 U.S. at 485 (emphasis added).

Tinker has been cited for the proposition that a wrongful act, done intentionally or recklessly without just cause or excuse, is "malicious" for purposes of section 17 of the Bankruptcy Act.[1] I believe *Tinker* stands for the narrower proposition that malice will be inferred only when the tortfeasor "necessarily" knows at the outset that his actions will cause serious injury to another and nevertheless persists. In *Tinker,* the Supreme Court regarded the act of criminal conversation — seduction of the plaintiff's wife — to be an act that "necessarily implies" a degree of malice. Here, however, the only intentional act was the bankrupt's setting fire to the boxes. I do not believe that this degree of intent "necessarily implies" that the bankrupt maliciously intended to destroy the store. Indeed, the state court specifically found that the bankrupt did not intend to set fire to the store. Morover, the ultimate injury to the storeowner's property was considerably less obvious and

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[1] *See generally* 1A COLLIER BANKRUPTCY ¶ 17.17 (14th ed. 1978).

foreseeable to the tortfeasor here, who merely set fire to some boxes, than was the injury in *Tinker* where the tortfeasor seduced the plaintiff's wife. Thus, the record is insufficient to support an inference that the injuries in this case were caused by malice within the meaning of section 17 (e) (8) of the Bankruptcy Act.

The result would not differ even if the bankrupt's acts could be considered "reckless."[2] Although some courts have cited *Tinker* to support holdings that recklessness can amount to malice under the statute,[3] the Court in *Tinker* never suggested that the bankrupt in that case had seduced the plaintiff's wife "recklessly." Reckless conduct does not "necessarily imply" malice. The law should not find malice where none has been shown. This position is consistent with the clear policy of the Bankruptcy Act that its discharge provisions should be construed liberally in favor of granting "fresh starts" to overburdened debtors.[4] The same view is adopted in section 523 (a) (5) of the new Bankruptcy Act, 11 U.S.C.A. § 523 (a) (5) (Special Pamphlet 1979). The new Act, using precisely the same language as the old, prohibits the discharge of debts arising from "willful and malicious" injuries to another's property. The legislative history of the new Act makes it clear that the words "willful and malicious" are to be construed according to their plain meaning:

---

[2] To consider the bankrupt's acts "reckless" would require a creative reading of the record because none of the courts below, state, Bankruptcy or District, attributed any recklessness to the bankrupt.

[3] *See* note 1 *supra*.

[4] Wright v. Union Central Insurance Co., 304 U.S. 502, 514 (1938); Newman v. Burnham, 126 F.2d 346, 337 (6th Cir. 1942).

> Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker* v. *Colwell* . . . held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.[5]

I would therefore reverse the decision of the District Court.

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[5] S. Rep. 95-989 at p. 79, 95th Cong. 2d Sess. (1978).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. .....

IN RE:
JOHN THOMAS DALY,

Bankrupt,

TRAVELER'S INSURANCE COMPANY, et al.

Plaintiffs,

v.

JOHN THOMAS DALY,

Defendant.

STIPULATION OF FACT

(Filed December 11, 1975)

John Thomas Daly through his attorney, Gene E. Schaefer, and Plaintiffs through their attorney, David M. Duwel, agree and stipulate to the following facts:

(1) That on or about January 20, 1971, Defendant, John Thomas Daly when eighteen (18) years of age, intentionally attempted to, and did, set fire to certain empty card-

board boxes located within a supermarket store owned by Big Bear Stores, Inc., located at 1591 West Lane Street, Columbus, Ohio, that said John Thomas Daly did not intend the ultimate destruction of the building but as a result of his intentional act of setting fire to such cardboard boxes, the building involved and the contents there were damaged.

(2) That on or about January 22, 1973, a Complaint was filed by the Traveler's Insurance Company and St. Paul Fire and Marine Insurance Company alleging in the first count that John Thomas Daly intentionally attempted to, and did, set fire to the building and the contents of Plaintiffs' insured and did further allege being the second count that the Defendant, John Thomas Daly, did negligently set fire to said building and its contents.

(3) That on 27 September 1974, judgment was entered against the Defendant, John Thomas Daly, by the Traveler's Insurance Company and the St. Paul Fire and Marine Insurance Company, said Entry being attached to this Stipulation of Fact and made a part hereof and further judgment was entered by the United States Insurance Company on November 20, 1974, by agreed Entry, said Entry being attached hereto and also made a part of this Stipulation of Fact.

GENE E. SCHAEFER
Attorney for Defendant

DAVID M. DUWEL
Attorney for Plaintiffs

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

73CV-01-234

THE TRAVELERS INSURANCE COMPANY, et al.,

Plaintiffs,

v.

JOHN DALY,

Defendant.

JUDGMENT ENTRY

(Filed September 27, 1974)

This cause having come on to be heard upon the Complaint of the Plaintiffs, The Travelers Insurance Company and The St. Paul Fire and Marine Insurance Company, the Court finds as follows:

1. On or about January 20, 1971, Defendant, John Daly, intentionally attempted to, and did, set fire to certain of the contents being empty cardboard boxes, of a supermarket store owned by Big Bear Stores, Inc. located at 1591 West Lane Avenue, Columbus, Ohio, that such Defendant did not intend the ultimate destruction of the building, and that as a direct and proximate result and the conse-

quence of his intentional act of setting fire to such cardboard boxes, the building involved here and the contents thereof were damaged.

2. Plaintiff, The Travelers Insurance Company, insured the building and contents of said supermarket store at 1591 West Lane Avenue, Columbus, Ohio, and has paid to the credit of its insured, Big Bear Stores, Inc., the sum of Sixteen Thousand One Hundred Ninety-Four and 21/100 Dollars ($16,194.21) pursuant to the terms and conditions of its said policy of insurance and has become subrogated to the rights and causes of action of Big Bear Stores, Inc., to the extent of said payment.

3. Plaintiff, The St. Paul Fire and Marine Insurance Company, insured the building and contents of a supermarket store owned by Big Bear Stores, Inc. located at 1591 West Lane Avenue, Columbus, Ohio, and has paid to the credit of its insured, Big Bear Stores, Inc., the sum of Twelve Thousand Nine Hundred Fifty-Five and 36/100 ($12,955.36) and has become subrogated to the rights and causes of action of Big Bear Stores, Inc. to the extent of said payment.

4. As a direct and proximate result and consequence of the Defendant's intentional act, the aforesaid losses were sustained and payments made by the Plaintiffs, to their insured, Big Bear Stores, Inc.

5. The Court further finds that as a matter of law, Defendant is liable under the Plaintiffs' First Cause of Action.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered for Plaintiff, The Travelers Insurance Company in the amount of Sixteen Thousand One Hundred Ninety-Four and 21/100 Dollars

($16,194.21) and for Plaintiff, The St. Paul Fire and Marine Insurance Company, in the amount of Twelve Thousand Nine Hundred Fifty-Five and 36/100 Dollars ($12,955.36) against the Defendant, John Daly. Costs taxed to Defendant.

/s/ JUDGE WRIGHT

APPROVED:

/s/ JOHN DUFFEY
Attorney for Defendant

/s/ KENNETH A. GAMBLE
Attorney for Plaintiffs

EXHIBIT "B"

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Case No. 74CV-06-2054

UNITED STATES INSURANCE COMPANY,

Plaintifi,

v.

JOHN DALY,

Defendant.

CONSENT
JUDGMENT ENTRY

(Filed November 20, 1974)

This cause having come on to be heard upon the Complaint of Plaintiff, United States Insurance Company, the Court finds as follows:

1. On or about January 20, 1971, Defendant, John Daly, intentionally attempted to, and did, set fire to certain of the contents being empty cardboard boxes, of a supermarket store owned by Big Bear Stores, Inc. located at 1591 West Lane Avenue, Columbus, Ohio, that such Defendant did not intend the ultimate destruction of the building, and that as a direct and proximate result and the

consequence of his intentional act of setting fire to such cardboard boxes, the building involved here and the contents thereof were damaged.

2. Plaintiff, United States Insurance Company, insured the building and contents of said supermarket store at 1591 West Lane Avenue, Columbus, Ohio, and has paid to the credit of its insured, Big Bear Stores, Inc., the sum of Sixteen Thousand Oone Hundred Ninety-Four and 21/100 Dollars ($16,194.21) pursuant to the terms and conditions of its said policy of insurance and has become subrogated to the rights and causes of action of Big Bear Stores, Inc., to the extent of said payment.

3. As a direct and proximate result and consequence of Defendant's intentional act, the aforesaid losses were sustained and payment made by Plaintiff, to its insured, Big Bear Stores, Inc.

4. The Court further finds that as a matter of law, Defendant is liable under Plaintiff's First Cause of Action.

Therefore, it is ORDERED, ADJUDGED AND DECREED that judgment be entered for Plaintiff, United States Insurance Company, in the amount of Sixteen Thousand One Hundred Ninety-Four and 21/100 Dollars ($16,194.21) against Defendant, John Daly. Costs taxed to Defendant.

/s/ GEORGE E. TYUCK
Judge

APPROVED:

/s/ JOHN J. DUFFEY
Attorney for Defendant, John Daly

/s/ KENNETH A. GAMBLE
Attorney for Plaintiff,
United States Insurance Company

APPENDIX D

PETERS v. UNITED STATES

GROSSCUP, Circuit Judge (dissenting). The policy of the Bankruptcy Law is to discharge all honest debtors who have fallen into insolvency, that they may have another opportunity in the race of life. The debtors excepted from his general policy are those who have become such through "fraud," or through the obtaining of property "by false pretenses of false representations," or through the committing of "willful and malicious injuries to the person or property of another." Under the old bankruptcy law, the exception founded on fraud could only be made out by the disclosure of "a fraud involving moral turpitude or intentional wrong," and did not extend to a mere fraud implied by law. Hennequin v. Crews, 111 U.S. 676, 681, 4 Sup. Ct. 576, 28 L. Ed. 565; Forsyth v. Vehmeyer, 177 U.S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723 (quotation from Tinker v. Colwell, 193 U.S. 488, 24 Sup. Ct. 509, 48 L. Ed. 754). The Supreme Court does not hold that "fraud," as the word is employed in the present bankruptcy act, is met by anything less than the foregoing, for it says (Tinker v. Colwell, 193 U.S. 489, 24 Sup. Ct. 509, 48 L. Ed. 754):

> "Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the Court in the above-cited cases released was of such a nature that it did not impute either bad faith or immorality to the debter, while in a judgment founded upon a cause of action, such as the one before us [crim. con.] the malice which is implied is of that very kind which does involve moral turpitude."

And, of course, a debtor who has become such through the obtaining of property by false pretenses or false representations (the second element in the list of exceptions), necessarily has become such debtor by bad faith, or conscious wrong. Up to this point then, so far as the Supreme Court has construed the present bankruptcy act, the exceptions are founded upon the element of bad faith or conscious wrong involved in the debts from which release is asked.

Is the third exception, "willful and malicious injuries to the person or property of another," to receive a like interpretation? I am deeply impressed with the belief that such will be the interpretation put upon it by the Supreme Court when the question is squarely presented to that Court. This impression is founded, first, upon the care that the Court has taken in Tinker v. Colwell to exclude any contrary impression; for in every sentence of the Court's opinion, stress is laid upon the element of actual bad faith and moral turpitude involved in the particular debt before the Court.

> "The judgment here mentioned comes, as we think," says the Court, "within the language of the statute reasonably construed. The injury for which it was covered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to per *such an injury* to be released by a discharge in bankruptcy." (The italics are my own.)

I am also impressed that it is the interpretation that, to carry out the intention of Congress, ought to be put upon

the phrase as used in the bankrupt act. The exception is in the nature of a denial — the denial of something that all others obtain. And it seems to me that Congress meant that this denial should be interposed, not upon any mere fiction of the law, or any mere empty implication of the law, but only upon the disclosure of something, in the transaction out of which the debt arose, that gives to it the color of bad faith or conscious wrong doing.

The case before us is that of a school teacher, who, in the lawful exercise of her power to inflict punishment, has inflicted excessive punishment. I say this is the case before us, because unless such be a "willful and malicious injury" within the meaning of the bankruptcy act, the judgment in the trespass suit is not conclusive upon the bankruptcy Court; for, by the law of Illinois and most common law jurisdictions, under the issue raised by the first count (trespass vi et armis for simple assault and battery), the pleas of moderate castigavit and son assault demesne, and the replication de injuria, a recovery could be had for an excess of force employed by the relatrix beyond reasonable chastisement, assuming, of course, that the evidence submitted warranted such recovery. Ayres v. Kelley, 11 Ill. 17; Fortune v. Jones, 30 Ill. App. 116; Hannen v. Edes, 15 Mass. 347; Bennett v. Appleton, 25 Wend. 371; Devine v. Rand, 38 Vt. 621. And, for the purposes of this appeal, the scope of that judgment, where doubt or ambiguity exists, must be construed most strongly against him who invokes it as res judicata; from which it follows, that the verdict returned, being a general verdict (and being as applicable to the first count as to the second or third counts) is as applicable to a case of mere excess of force, initially lawful, employed beyond reasonable chastisement, though without any conscious or designed wrong-doing, as it would be to a case of assault originating in conscious wrongdoing.

No one pretends that a school teacher chastising a pupil, or a master of a vessel punishing some member of his crew, or an individual resisting an assault, may not, without actual malice, go beyond the force actually needed and therefore make themselves liable to a civil action for trespass vi et armis. In each of these cases, the malice imputed may be the mere "fiction of malice" — a fiction created to give the complaining party a standing for a civil suit in the form of action selected. There is in such conduct, unless of course actual malice is shown, no bad faith or conscious wrong — nothing indeed that distinguishes the moral quality of the act from the moral quality of the owner of a factory who allows his employees to come into contact with defective machinery, or the owner of a carriage who takes in a passenger with knowledge that he has a defective vehicle, or, as put by Justice Peckham in Tinker v. Colwell, supra, "one who negligently drives through a crowded thoroughfare and negligently runs over an individual, would not, as I suppose, he within the exception."

True, in In re Murphy, 109 Ill. 31, it was said that malice was the gist of an action of trespass for assault and battery; but it was not ruled that mere malice, as a fiction of law, was the same thing as conscious wrong-doing. The facts in In re Murphy are not given. The case relied on as a precedent was First National Bank of Flora v. Burkett, 101 Ill. 392, 40 Am. Rep. 209, in which it was said:

> "It (malice) in some cases implies a wrong inflicted on another, with an evil intent or purpose, and this is the sense in which it is employed in the statute."

And for anything appearing in In re Murphy, it was that kind of malice that was there shown. Indeed, the Court says, speaking of the facts before it (as already said, the facts are not reported) :

> "Here there was an intent to do harm, and an unlawful execution of that intent, resulting in the infliction of a wrong and injury upon another. Under such circumstances was malice the gist of the action?"

And that this, in its application to the State insolvent law, is as far as the Supreme Court of Illinois meant to go (considering the case as one of actual malice and not mere malice by fiction of law) is shown by that Court in the subsequent case of Jernberg v. Mix, 199 Ill. 254, 256, 65 N. E. 242, where it is said:

> "The term 'malice,' as used in the act in question (the insolvent act) applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the intentional perpetration of an injury or a wrong on another."

Let me not be misunderstood. As I understand the Supreme Court of the United States in Tinker v. Colwell, and the Supreme Court of Illinois in the cases just spoken of, a distinction is observed, where the bankruptcy and insolvent laws are involved, between malice as a fiction of law and malice arising from bad faith or conscious wrongdoing. Indeed, in the supposititious case stated by Justice Peckham, the form of action might have been trespass vi et armis or trespass on the case, that is to say might have been an action implying malice by fiction of law, or an action not implying malice at all, depending, on the election of the plaintiff, whether he counted upon the negligence or upon the forcible invasion of his right to security as the basis of recovery. Percival v. Hickey, 18 Johns. (N.Y.) 257, 9 Am. Dec. 210. That Congress intended that discharge from debts, under this exception to the general policy of the bankruptcy law, should be granted or denied, not according to the real in-

herent quality of the transaction out of which the debt arose, but wholly in accordance with the accident whether recovery is sought in one form of action or another, I cannot believe; for whether, as a mere fiction of law, there be malice or not, the moral character of the wrong complained of is the same, the evidence alone determining the animus of the act. And in the case before us, the evidence alone can determine whether or not the excessive punishment was due to an honest mistake of judgment or want of due care, or whether it was due to motives of ill-will, hatred and malevolence.

I am giving expression to this dissent because, in my judgment the majority opinion misinterprets Tinker v. Colwell (and in that decision there were four dissenting justices); and because this misinterpretation, unless this clause of the bankruptcy act is construed by the Supreme Court, is liable to be followed by what seems to me an unjust, if not unauthorized, application of the law.

One other phase of this question has thus far wholly gone unnoticed. The phrase, in the bankruptcy act, is "willful and malicious injuries." If this means that willfulness and malice, even though the malice be merely a fictious malice, must concur, then the case of a school teacher, master of a vessel, or party assaulted, who uses more force than what is needed, but does it without consciousness of such excess, cannot be said to be willful, for "willful" means conscious intention. And to put such an interpretation upon the phrase — joining the two words as characterizing the act — brings this third exception into line with the first and second exceptions, to-wit, "fraud" and the obtaining of property by "false pretenses or false representations."

I am not sure that the order appealed from in this case

should be affirmed. That might preclude the holder of the judgment from showing, in some appropriate way, that the injury was actually malicious. But the judgment from which this is a dissent, on the other hand, accepts the judgment in the trespass suit as res judicata, and thereby forestalls any appropriate inquiry as to whether the injury was without actual malice, bad faith, or conscious wrong-doing.